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THE STORY OF MORTGAGE LAW.

THE idea of a lien upon the property of another is simple, and easy of apprehension. It must have prevailed at all times and among all civilized nations, and we find it in every system of law of which we have knowledge.[1] It is so general and so deeply rooted among our people, that persons are constantly imagining a lien in cases where the law provides none. One new lien follows another in legislation, and each new-comer readily domesticates itself in the popular thought and speech.

It is not essential to a ready apprehension of the idea of lien that the property be in the lienor's possession. A sailor's lien for wages follows a vessel all over the world, and an ignorant seaman, on shore at Liverpool or at Boston, easily understands the hold which he has on a ship at the Straits of Malacca. The statutory mechanic's lien and material-man's lien on buildings and land, the liens of attaching and of judgment creditors, and tax liens on real estate, are thoroughly at home in the popular mind, so that a proposition to sell a house subject to mechanics' liens, or to taxes, conveys a precise and well-defined idea.

There is nothing necessarily artificial or complex, therefore, in the giving of security upon real estate. The right to be given is easy of apprehension and easy of expression. "In case I

[1] See Hamilton's Hedaya, book xlviii., Pawns.

should despise thee," says an ancient recorded Egyptian marriage settlement, extremely detailed in its provisions, " in case I should take another wife than thee, I will give thee twenty argenteus, in shekels one hundred, twenty argenteus in all. The entire of the property which is mine and which I shall possess, is security of all the above words until I shall accomplish them according to their tenor." [1] Nevertheless, in our form of giving security on real estate to secure a common debt, or otherwise to provide assurance, we find a contract so artificial and so difficult of apprehension as to elude definition. In speaking of real-estate mortgages in England, where, from a difference in theory between the English law and ours, to be noticed later, the difficulty of definition is less than it is with us, one of the clearest of modern writers, Mr. Williams, attempts to avoid the defects of earlier definitions by defining a mortgagee's estate in land as " a mortgage debt; " [2] and yet he is compelled, in the very first page of a chapter so entitled, to admit that a debt is not an essential feature of a mortgage estate; [3] for of course there may easily come to exist, in any one of a variety of ways, a mortgage without a personal liability.

A common mortgage deed is, in its form, neither more nor less than a deed upon condition. It first professes to convey the land outright; it then goes on with a proviso that upon payment of a certain sum at a certain day, for instance, the conveyance shall be null and void. It is precisely in the form of deeds upon condition, such as are given without the slightest color of the idea of mortgage. A deed on condition that the grantee shall build a mill on the land within two years,[4] and a deed on condition that the grantee shall pay a certain note within two years, may be word for word in the same form; and yet, while the one is in fact a conveyance upon condition, and may give a fee, the other is a mortgage, and gives only a chattel estate in the land, — only a lien. A person unfamiliar with the English and the American law, but versed in the English tongue and in law in general, would never dream that a deed in this form, apparently clear and

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[1] Records of the Past, vol. x. pp. 75–78, where the instrument is characterized by the learned editors as a "mortgage." Comp. Just. Inst. l. iv. tit. 6, § 29.

[2] Williams, Real Prop. 421.

[3] Ibid.

[4] Langley *v.* Chapin, 134 Mass. 82.

intelligible in its terms, could have for its single object the creation of a lien.

The writer to whom allusion has just been made is entirely capable of defining anything which is capable of definition, and the difficulties which he and every one else meets in attempting to define a mortgagee's estate in land, lie in the fact that in the creation of this lien we employ fictitious statements, and with the resulting obscurity which usually attends upon fictions. A common mortgage deed says one thing; it really means another thing; and yet there cling to the net result certain barnacle features, due to what the writing says but does not mean. A mortgage deed commonly professes to vest in the grantee real estate; it really vests in him, in this country, only a chattel interest in real estate. It declares that upon default the mortgagee shall at once, by the mere operation of the deed, have an absolute title, free from all right of the grantor; it really gives the grantee, from the time of default, a mere right to enforce payment or indemnity. It professes to leave in the grantor nothing but a right of re-entry upon certain terms; it really leaves in him, in this country, the absolute ownership, subject, it is true, to a charge, but only as the ownership of land may always be subject to a charge, — for taxes, for an annuity, for a mechanic's lien, for debts of an owner deceased. It must have the word "heirs,"[1] or the security dies with the mortgagee, even though the debt is unpaid; yet the interest granted is not realty; there is no dower or curtesy in it, because it is not real estate, and it goes to the executor, and not to the heirs. In Massachusetts a mortgage on land is attachable as realty if owned by a State bank or a domestic insurance corporation;[2] otherwise not. We find it laid down, on the one hand, in the law reports and statutes of a given State, that a mortgage of land is a mere "pledge" or "hypothecation" of it, and creates only a "lien;"[3] that a mortgagor by deed and defeasance may relinquish his title by simply cancelling his bond of defeasance;[4] and yet we find in the same reports the doctrine laid down that, unless the condition is performed on the day fixed, the mortgagor's

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[1] Sedgwick *v.* Laflin, 10 All. 430; Allendorff *v.* Gaugengigl, 146 Mass. 542; 1 Jones, Mortg. § 67.

[2] Mass. Pub. Sts. c 118, § 92; St. 1887, c. 214, § 27.

[3] Jackson *v.* Mut. Fire Ins. Co., 23 Pick. 418, 424; Ewer *v.* Hobbs, 5 Met. 1, 3; Butler *v* Page, 7 Met. 40, 43; Mass. Pub. Sts. c. 178, § 44.

[4] Trull *v.* Skinner, 17 Pick. 213.

ownership of the land is gone, at law, and the legal ownership is now in the mortgagee,[1] subject only to a right of redemption in equity, — a proposition maintainable only by viewing the mortgage deed as a deed on condition and not as a deed creating a lien.

The truth is, that what the deed says, and what some centuries ago it really meant, the courts have gradually forced into meaning a very different thing; and that legislators, through caution, or through lack of progressive thought, have chosen to import from time to time new contract features into the ancient form, rather than to establish a new form, or to revert to an ancient form in harmony with fact. And so it is that while a mortgagee's interest in land has for a long period, in this country, been a mere chattel estate, and has amounted in substance to a mere pledge of the land, and is constantly characterized as such, we still continue to create it by a deed professing in terms to grant a conditional fee, and permit to cling to the contract, like a lichen growth, certain embarrassing features of real-estate title.

The story of the way in which this has come about offers to students of law a suggestive lesson in processes of legal thought. The explanation of our present confusion of thought and falsity of statement in mortgage law, and of the singular divergence, by a mere popular drift and without legislation, between England and this country on this head, and, to a certain extent, between two sets of States of the Union, can be explained only by going back to the sources of our mortgage law. But although we have to go so far for a starting-point, we shall not lose ourselves in the obscurity of a dim past, or be disturbed by vagueness in the connection of events.

In nothing are the traditions of a people more rigid than in the matter of actual land titles and land-title law. The law of land in the States of our Union is full of principles and arbitrary conventions established in England long before the Conquest, — such, for example, as dower, and the forty days' right of a widow. It would probably have been impossible for the Norman judges, after the Conquest, to subvert, if they had desired so to do, the existing land law of England. But those judges enriched and amplified the existing system, and filled its gaps, as occasion was,

[1] Currier *v.* Gale, 9 All. 522.

by drawing upon the highly elaborated foreign system of law with which, through the medium of Italian writers, they were familiar.

The Roman law, which these judges knew, — "the spring-head of the English jurisprudence upon the subject of these securities," [1] — offered a simple, rational, and convenient system of pledging land. When a lien was to be created, it went about the creation of it simply. The lender was to have a lien; it gave him nothing less, nothing more, stating frankly that it did so. Moreover, to meet the necessities of practical affairs, it did not require a transfer of possession. That was as the parties might agree. The law of Attica, in a remote antiquity, had done the same, indicating a pledge without possession by a pillar or tablet set up on the land, inscribed with the creditor's name and the amount of the debt. That feature of the reforms of Solon which extinguished mortgage debts was characterized as having removed the pillars from Attica.[2]

The Roman law made no material distinction, in matter of pledges, between land and chattels. The system was one and the same for a farm and for a cart. If a pledgee took possession, the transaction was a pawn; if not, it was a hypothecation. And to obviate embarrassments from the pledgor's retaining possession, and with it a show of ownership, it was quite early provided that a fully effective hypothecation could be made only by some notorious act recognized by law, as by registration in a public office.[3]

It fortunately happened that this system was entirely in harmony with the ideas already existing among the English people. Its plain and natural scheme would seem to have been, if not instinctive with the whole human race, at least common to the Indo-European stock. It is set forth with great distinctness and full elaboration in the early law of India.[4]

The Anglo-Saxon word for pledge was etymologically the same as the Roman word, *vadium*. This fact, of itself, at least suggests a community of ideas of immemorial antiquity. The Saxon law seems very clearly to have run parallel with the civil law, even to

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[1] Swayne, J., Gilman *v.* Ill. & Co. Tel Co., 91 U. S. 603, 615.

[2] Grote, History of Greece, vol. iii. part ii. chap. xi., where the historian quotes from a fragment of the iambics of Solon a striking personal appeal to the Earth, addressed as having passed by Solon's hand from slavery into freedom.

[3] Cod., l. viii. tit. 18, § 11; Sandars, Just. Inst. 227. See Cod., l. viii. tit. 18, § 11.

[4] The Hedaya, book xlviii., and see, in particular, chap. ii.

the point of registration, which was effected in early England by depositing a written instrument in the county court or in a monastery.[1] It is interesting to notice that, upon the settlement of this country, a system of registration of deeds instantly sprang up, fully developed, as if it were an underground stream suddenly risen to the surface.

When, therefore, after the Conquest, lenders desired to advance money upon landed security, the Norman judges had ready at hand, in their own civil law, fully worked out, a simple and practical system of giving security, entirely consonant with the habits of thought of the English people.

Using the word *vadium*, gage, whether the possession was to be turned over to the pledgee or not, the Norman judges recognized gages or pledges of land, either with or without transfer of possession. If the pledgee took possession, the transaction was a pawn;[2] if not, it was a hypothecation.

It would be the greatest mistake to suppose that feudal seisin was essential to an effectual pledge of land in feudal times. The pledgee might leave the pledgor in possession, and still be secure, by recording a written contract of pledge in the King's Court;[3] precisely as, under Justinian, such a contract would have been registered in a public office, or, under the Saxon laws, in a county court or a monastery. This provision for registration was a mere adaptation to English ground of the Roman system.

Even when the pledgee of land, in feudal times, took possession, he did not take a full feudal seisin; he took only a "*quasi*" seisin,[4] a seisin "*de vadio*,"[5] as it was called, — a "pledgee's

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[1] 2 Bl. Com. 342, 3.

[2] 4 Bract. (Rolls Ed.) 74, 236.

[3] Quandoque vero convenit inter debitorem et creditorem de re aliquâ invadiatâ, acceptâ à debitore re mutuatâ, si non sequatur ipsius vadii tradito, quomodo confuletur ipsi creditori in tali casu, maxime cum possit eadem res pluribus aliis creditoribus, tum prius tum posterius, invadiari? Super hoc notandum est, quod Curia domini Regis hujusmodi privatas conventiones de rebus dandis vel accipiendis in vadium, vel alias hujusmodi, *extra Curiam sive etiam in aliis Curiis quam in Curia domini Regis factas*, tueri non solet nec warrantizare; et ideo si non fuerint servatae, Curia domini Regis se inde non intromittet, ac per hoc de jure diversorum creditorum priorum vel posteriorum aut de privilegio eorum, non tenetur respondere. Glanv., lib. x. c. 8 It is very singular that Blackstone, in quoting from this passage, garbles it, and omits the vital qualification *extra curiam . . . factas*, thus entirely reversing the sense. See also, as to agreements made in the King's Court, Glanv., lib. viii cc. i.-iii.

[4] Bract. (Rolls Ed.) 74, § 4.

[5] Glanv., lib xiii cc. 2, 26-30; 4 Bract. (Rolls Ed.) 236-240.

seisin," — a seisin distinct from a general seisin, not exclusive of that of the pledgor, but consistent with and dependent upon it, — a parasitic seisin. The word "seisin," of course, was not exclusively applied to freehold estates in land, but was used of chattels and of chattel estates in land, as leaseholds. And just as a lessee of land had not a seisin of his own, but had his landlord's seisin, so in the case of a pledge, even with possession, the freehold was deemed to remain in the pledgor, and the pledgee was said to be seised "through" the owner of the fee,[1] — to be seised not in his own name, but in the name of another.[2] The heirs of a pledgee who died in possession were spoken of in contradistinction from the "*verus haeres*."[3] The fact that land so in pledge, and even in the possession of the pledgee, was still viewed as in the seisin of the pledgor, appears from the fact that it was subject to dower, not of the pledgee's, but of the pledgor's widow;[4] and there could be no dower without seisin. If a pledgee in possession were ousted by a stranger, he could not maintain a writ of novel disseisin to recover possession: the pledgor had to bring the action, counting on his own seisin.[5] And where one seized as pledgee died in possession, and his heir, being excluded, brought a writ of *mort d'ancestor*, to get possession, he was provided, not with the ordinary writ of *mort d'ancestor*, counting upon seisin generally, but with a special writ, alleging in his ancestor a seisin *de vadio*.[6]

The legal remedy for enforcing a simple gage or pledge of land, in the time of Glanville, so far from having those harsh features which we are wont to attribute to our early law, followed that just and equitable system of Roman law which was the cradle of our equity. When a debt secured upon land was due, the pledgee had a writ expressly framed for foreclosure,[7] substantially identical with the Massachusetts writ of entry for foreclosure of a mortgage. The process could be enforced by the courts by a

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[1] Glanv., lib. xiii. c. 11: "Qualemcunque seisinam, scilicet per ipsum tenentem vel per aliquem antecessorem ejus, veluti in vadio."

[2] 4 Bract. (Rolls Ed.) 550, "de vadio, . . . et sic in nomine alieno."

[3] Glanv., lib. xiii. c. 28.

[4] 4 Bract. (Rolls Ed.) 548: "Si autem invadiaverit," etc.; 550: "Item quod nunquam," etc.

[5] Glanv., lib. x. c. 11.

[6] Glanv., lib. xiii. cc. 26–30.

[7] Glanv., l. x. c. 7. "Rex vicecomiti salutem: Præcipe N. quod juste et sine dilatione acquietat rem illam quam invadiavit R. pro centum marcis usque ad terminum qui præteriit, ut dicit, et unde queritur quod eam nondum acquietavit; et nisi fecerit," etc.

seizure of the property pledged, if it remained in the pledgor's possession, or by other distraint; and there was a conditional judgment precisely as there is upon the Massachusetts writ of entry for foreclosure, that the debtor should still have a reasonable time to pay before the foreclosure should become absolute.[1]

The word "mortgage" had already come into vogue in Glanville's day. It was employed to designate that species of pledge in which, by the terms of the bargain, a pawnee of land, a pledgee in possession, was to keep the income or profits of the land without applying them to payment of the debt. The word "mortgage" — dead pledge — was used precisely as we use the phrases, "dead capital" and "dead investment." Land in the possession of a pledgee upon these terms was dead; it gave no return to the owner.[2] This feature of a contract of pledge, although not prohibited, was looked upon as unjust and dishonest, and was viewed as savoring of usury. "Hence," says Glanville, "if any one die having such a pledge, and after his death this be proved, his goods are to be treated as the goods of a usurer."

As early as the time of Glanville, a form of contract had come into vogue, by which one might pledge his property on the terms that, upon default, the pledgee's interest should by the mere force of the contract convert itself into a fee and become absolute.[3] This form of contract was still in use when Bracton wrote, seventy years later, about A.D. 1250.[4] The plan was this: One who desired to borrow on land, granted the land to the lender, in pledge, remainder to the grantor, the borrower, in fee, on the expiration of the *vadium*, *i. e.*, on payment of the debt. If the pledge were *pignus*, and the pledgee were in possession on the day of default, his freehold began at once in possession; if not, he had to resort to a real action to get possession;[5] but his title was absolute. The time being come and the money not paid, the foreclosure was automatic.

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[1] See Glanv., lib. x. c. 8.

[2] Glanv., lib. x. c. 8. See Beames's Glanville, lib. x. c. 8, note.

[3] Glanv., lib. x. c. 6.

[4] 1 Bract. (Rolls Ed.) 156, 160; 4 ib. 258: "Creditor incipit possidere in feodo . . . in crepusculo si ad diem, . . . et ita eodem modo quo priùs statim et sine mora descendit jus merum ipsi creditori." 1 Bract. (Rolls Ed.) 236, 8. The language used by Bracton, and the probabilities, indicate that this device was brought in from the civil law. In 1 Bract. (Rolls Ed.) 146, certain forms of conditional grants are openly derived from the civil law.

[5] 1 Bract. (Rolls Ed.) 160, *ad fin.*

Certainly this system was efficient enough. The only thing of which the pledgee could in the least complain was, that in any action which involved the validity of his title, the burden of proof was always on him to show the debt. This difficulty the lender class next set themselves about getting rid of. If it could be contrived to give the lender, at the outset, not a mere title *de vadio*, but a title *prima facie* absolute at its inception, that is, absolute unless and until defeated by affirmative proof of payment, the final problem would be solved. Such a step would give the creditor full and unqualified seisin in the first instance, leaving the debtor only a right to end that seisin by paying according to the strict letter of the deed, and consequently would throw the burden of proof upon the borrower, the pledgor, in any contest which might arise. The solution of the problem was very early found in the use of the deed upon condition.

We find no trace in Bracton of any such use of a deed upon condition, and it is quite safe to assume that the device of employing it for security had not then been invented; but from the great variety of instances of conditional grants of which Bracton speaks, based on the civil law, it is plain that it only remained for some one to make the experiment. The experiment was made, and the practice, once begun, quickly threw into disuse the mere pledge; and security upon land now came to be exacted and given by an outright conveyance of the fee, conditioned to be void in case the grantor should within a certain time pay a certain sum, but otherwise to stand absolute. This was precisely our modern mortgage. As it reads upon the records in Boston and in Portland, so it read in England in the thirteenth century.

At a very early period the courts began to interpose to defeat the strict operation of these conditional deeds. really given for mere security.

Equitable interposition in this regard is commonly attributed to courts of equity as distinguished from courts of law; but it very probably began long before the establishment of distinct chancery tribunals. If the public opinion of early England demanded a softening of established rules, that modification could perfectly well be effected in England, as it was in Rome, by the introduction of equity into law, through the allowance of exceptions founded on equitable grounds. In very early times

the courts of law in England showed themselves capable of equitable procedure.[1] Glanville and Bracton are full of allusions to it. The foreclosure process to which allusion has been made above, allowing the debtor to pay and redeem, even after default and suit brought, was a distinctly equitable, as distinguished from a legal, proceeding, and very likely represented the result of a very ancient struggle between courts and creditors, just such as we are now describing, a struggle repeated time and again in the history of the human race.[2]

It was not all at once, of course, that the courts began to recognize as a general right, in every case of a deed on condition given for security, such a thing as an "equity of redemption." Very likely the general judgment of men may have been, at the outset, that no such general right, amounting in its fixedness to an equitable estate in the land, was called for; and perhaps the automatic foreclosure, at a day fixed, of a security by conditional deed may have seemed to our ancestors no more harsh than the abrupt and final cutting off of an equity of redemption after the end of a fixed period allowed after entry, seems to us. It was only as the result of a very long succession of decisions, in repeated instances, that such a general right came to be recognized and given a name. At last, however, and long ago, as we all know, the right of him who had given a deed on condition for the purpose of securing payment of a debt, or otherwise of providing assurance, ceased to be discretionary, and came to be a fixed equitable estate in the land.

At a period, therefore, prior to the settlement of this country, the law of security on land had gone through several stages. It had begun with the plain and simple system of pledge of the Roman and Saxon law, with a foreclosure procedure equitable to the debtor. It had gone through successive stages of devices by creditors to cut down the debtor's right, and it had ended with a system by which the debtor's substantial rights were guarded very much as they had been at the time of the Conquest, — a system, however, which employed a form of instrument most ill adapted to its purpose, making him who really should have had only a lien, the owner of the land at law, and involving the neces-

[1] 3 Bl. Com. 49–52.

[2] As to the employment of substantially this device, to avoid the Roman law of pledge, see Moyle, Imp. Just. Inst., vol. i. pp. 315, 316.

sity of two distinct sets of tribunals to cover the whole field of the respective rights of the parties.

Still another scheme of conveyance was devised. It made use of two instruments. The first was a deed of the land from the debtor to the creditor, absolute in form. Concurrently with it the creditor gave to the debtor a bond, which came to be known as a bond of defeasance, agreeing that if a certain sum of money, for instance, were paid by a certain day, the deed should become inoperative; or, to use another form, that the grantee, the creditor, would reconvey. It was attempted by this devise to make the transaction operate as a sale of land, with an option of buying back.[1] If it could so operate, the debtor's rights would be lost immediately upon default. The courts of equity, however, decided in England, and it was very early decided in this country at law, that such a transaction, if intended in fact for mere security, was nothing but a mortgage. In this country a distinction has been made, but, as it seems to the writer, upon not very satisfactory grounds, to the effect that if the defeasance is not sealed, it operates only in equity to turn the deed into a mortgage, having no broader effect, therefore, in this respect, than a mere oral agreement of defeasance.[2]

Still another form of conveyance was tried. The land was conveyed to the creditor or to some third person upon the trust that it was to be availed of by holding it to the creditor's use, or by selling it, in case of a failure to pay the sum secured, and paying the debt from the proceeds. This form of security attained great popularity, and is now in use in a large number of our States, and it is used in all the States for bonded debts. As a device to avoid the law of mortgage, however, this scheme failed; for the courts decided that a deed, in form a trust deed, but given in fact as security, did not convey a trust estate, but was a mortgage, and gave nothing but a mortgagee's estate.[3]

This left several forms of conveyance in use, no one of them professing to create a mere lien, all diverted from their original office, all warped away in operation from their language, all nevertheless, diverse as they were, resulting in one and the same contract.

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[1] See Moyle, Imp. Just. Inst., vol. i. pp. 315, 316.

[2] Kelleran *v.* Brown, 4 Mass. 443. See Stocking *v.* Fairchild, 5 Pick. 181.

[3] See Alison, *in re*, 11 Ch. D. 284; Locking *v.* Parker, L. R. 8 Ch. 30; Teal *v.* Walker, 111 U. S. 242.

Still another device remained to be tried. Driven from every form of deed which in any way admitted or indicated on its face the notion of security, ingenious conveyancers devised the plan of having a necessitous borrower convey his land to the creditor outright, taking back no writing whatever, but trusting entirely to an oral understanding. But no sooner did courts of equity lay hold of this new enterprise, than they declared this also to amount in equity to a mortgage; and in England, where the mortgagor's estate is in all cases merely equitable, a mortgage in this form does not essentially differ in results from a mortgage by conditional deed.

There remains to be recounted perhaps the most interesting stage of all in the story of mortgage law; namely, the radical divergence, without legislation, of this country from England.

When this country was colonized, about A.D. 1600, the law of mortgage was perfectly well settled in England. It was established there that a mortgage, whether by deed upon condition, by trust deed, or by deed and defeasance, vested the fee, at law, in the mortgagee, and that the mortgagee, unless the deed reserved possession to the mortgagor, was entitled to immediate possession. Theoretically our ancestors brought this law to America with them. Things ran on until the Revolution. Mortgages were given in the English form, by deed on condition, by deed and defeasance, or by trust deed. It was not customary in Plymouth or Massachusetts Bay, and it is probable that it was not customary elsewhere, to insert a provision that the mortgagor, until default in payment, should retain possession. Theoretically, during the one hundred and fifty years from the first settlement to the Revolution, the English rules of law governed all these transactions, and, as matter of book law, every mortgagee of a house or a farm was the owner of it, and had the absolute right to take possession upon the delivery of the deed. But the curious thing about this is, that the people generally never dreamed that such was the law.

As there gradually grew up a class of trained lawyers, they must have ascertained what the book law on the subject was. The people, however, took issue with them. To set the dispute at rest, and to inform the people what the law was, Judge Trowbridge, of the Supreme Judicial Court of Massachusetts, undertook to explain the law to his fellow-citizens, in a semi-official deliverance, known as "Judge Trowbridge's Reading," a paper which was deemed of so

high authority that it was printed after the author's decease in the law reports,[1] a fact which would seem to indicate the concurrence of the court. This paper laid it down explicitly that the mortgagee was the legal owner of the land, and that the farmers and householders throughout Massachusetts, whose lands were mortgaged, were not the owners of their farms and their houses, but had mere equitable estates. It is quite safe to assume that this opinion was held by the learned in the law throughout the country. Theoretically it was law. Gradually the question came up for decision in the different States, and, contrary to all theory, it was everywhere held that in this country a mortgage deed, although in the form of a common-law deed upon condition, amounted before breach to nothing but a pledge of the land, and gave the mortgagee simply a pawn or a hypothecation of it.

But while it was held in almost all, if not all, of the States that as to every one but the mortgagee the mortgagor was the legal owner, and the mortgage was a lien, it was nevertheless held in Massachusetts and in some other States that the mortgagee was, in accordance with the language of the deed, entitled to immediate possession even before breach, unless possession were reserved to the mortgagor. It is singular that courts which were prepared to ignore the language of a mortgage deed, in so far as it professed to divest the mortgagor of title, were not prepared to ignore it in the subsidiary matter of possession. In New York and other States the courts carried the doctrine that a mortgage was a pledge, to its logical results, and denied to the mortgagee the right of immediate possession. It is plain from the language of the early Massachusetts cases that the declaration by the courts of a right of immediate possession in the mortgagee was a surprise to the people of the State.

Within the last few decades a power of sale has very commonly been introduced into mortgages; some of the States control judicially the exercise of the power, and in all the States the power is subjected to the same equitable control which is exercised in general over matters of mortgage.

In view of the fact that a lien on land is a form of interest constantly recognized, familiarly understood, and capable of being clearly expressed, and that a lien voluntarily created by contract, for security, does not necessarily differ in this respect from the

[1] 8 Mass. 551.

familiar statute liens, why would it not be well to abolish by statute the present artificial and obscure forms of mortgage contract, the net result of the operation of which no one can define, and to provide for a return to a brief and simple deed of pledge, such as ingenuity has led us away from?

H. W. Chaplin.

BOSTON, March, 1890.

THE RIGHT OF ACCESS AND THE RIGHT TO WHARF OUT TO NAVIGABLE WATER.

THE right to wharf out to navigable water is unknown to the common law of England. The erection of a wharf upon public lands without the consent of the Crown is a purpresture.[1]

There is, however, in the English law what is known as the riparian right of access, incident to lands bordering upon navigable waters. The celebrated case of Lyon *v.* Fishmongers' Company[2] has been understood to decide that this "right of access," like the riparian right to the appropriation and beneficial use of running water, is a "natural right," dependent solely on natural relations.[3] The words of Lord Selborne in that case have been quoted as applicable to the right in question: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream."[4]

Lord Selborne said, with reference to this right: "The cases as to the alterations of the levels of public highways . . . seem to be authorities *a fortiori* . . . because they had not in them the element of a right *jure naturæ*."[5]

These decisions contain almost the only explanation thus far offered in the cases of the origin and nature of the English right of access, and this fact, together with the fact that most riparian rights are "natural rights," necessitates for the proper classifica-

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[1] Gould on Waters, § 21, and authorities cited.

[2] 1 App. Cas. 662.

[3] Lake Superior Land Co. *v.* Emerson, 38 Minn. 406.

[4] 1 App. Cas. 682 (quoted in Lake Superior Land Co. *v.* Emerson, *supra*).

[5] 1 App. Cas. 684 (quoted in Lake Superior Land Co. *v.* Emerson, *supra*).